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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 363

CHARLES R. KING, SPECIAL ADMINISTRATOR OF THE ESTATE OF THOMAS C. CARROLL, DECEASED,
Petitioner,

vs.

NICHOLSON TRANSIT COMPANY, A MICHIGAN CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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INDEX

Subject Index

	Page
Statement of Matter Involved	1
This Court Has Jurisdiction	4
Argument	5
The Question Presented	8
Reasons Relied Upon for Allowance of Writ	8

Citations

Cases:

Carter v. *Atlanta & St. Andrews Bay Railway Co.* (1949), 338 U. S. 430	6
Chambers v. *Florida*, 309 U. S. 227	5
Chicago, M. & St. P. Ry. Company v. *Coogan*, 271 U. S. 472	4
Craig v. *Harney*, 331 U. S. 367	5
Creswell v. *Grand Lodge*, 225 U. S. 246	5
Fiske v. *Kansas*, 274 U. S. 380	5
Graham v. *Atchinson, T. & S. F. Ry. Co.*, 176 F. 2d 823	7
Hust v. *Moore-McCormack Lines*, 328 U. S. 707	6
Norris v. *Alabama*, 294 U. S. 587	5
Schnee v. *Southern Pacific Co.*, 186 F. 2d 746	7
Stanczak v. *Pennsylvania Railroad Co.*, 174 F. 2d 43	7
Sterling v. *Constantin*, 287 U. S. 378	5
Wilkerson v. *McCarthy* (1949), 336 U. S. 53	6

Statutes:

Merchant Seamen's Act of June 5, 1920, c. 250	4
Act No. 217, Public Act of 1915; as amended by Act No. 44, Public Acts of 1939 (Mich. Stat. Ann. § 27.1461) Empson Act)	3
28 U.S.C.A. (Revised 1948) Chapter 81, Sec. 1257	4

right of jury trial (46 U. S. C. A. § 688) by decision of the Supreme Court of the State of Michigan, on appeal, in assuming to pass upon the weight of the evidence adduced at the trial, and setting aside a verdict of a jury in a lower trial court, without granting a new trial (152, 158).

Petitioner's decedent, Thomas C. Carroll, on and prior to December 31, 1945, was a seaman, employed as porter and member of the crew of the Steamship *James Watt* (3, 48), owned and operated by respondent, the Nicholson Transit Company (2). It is admitted by respondent, in its answer to petitioner's declaration, that the Steamship *James Watt* was engaged in shipping on the Great Lakes, in interstate and foreign commerce (9).

While the Steamship *James Watt* was in a floating drydock for repairs, on December 31, 1945, at River Rouge, Michigan (3), petitioner's decedent was injured fatally when he fell forty feet from the ship's gangplank, to the steel bottom of the drydock below, while attempting to leave the ship at the conclusion of his day's work (4, 32, 33, 69).

Testimony of witnesses for the petitioner at the trial in the lower court established directly, or permitted an inference to be drawn, *first*, that the gangplank was an unsafe appliance because of its sagging rope railing (38, 39, 88), its steep angle of slope (in excess of 25 degrees from the horizontal) (71), its worn cross-cleats (26, 88), and the possibility of dangerous vibration over its twenty-four-foot length; and, *secondly*, that the gangplank was not maintained in a safe condition, but was permitted to accumulate ice and snow following a rain, freezing temperatures, and a light fall of snow (20, 63, 64, 65, 99, 102).

Additional elements of the respondent's negligence which were established at the trial were that no gangway watch was posted, or on duty, at the time petitioner's decedent fell to his death (51, 96, 97), and that the gangplank was inadequately lighted (33).

Petitioner brought an action against respondent in the Circuit Court for the County of Wayne, State of Michigan, basing his first count upon the Jones Act for negligence relating to a dangerous, unsafe and defective mode of egress from and ingress to the vessel, together with the negligence of certain of respondent's agents, servants and employees, and basing his second count upon the Jones Act for the negligence of respondent, its agents, servants and employees, in failing to provide prompt medical and hospital care (2-7).

At the close of proofs in the Circuit Court, before a jury and the Hon. Robert M. Toms, who presided at the trial, on motion of the respondent, the court dismissed Count II, but allowed the case to go to the jury on Count I. The court reserved its decision on the motion to dismiss as to Count I under the Empson Act (120). The jury, on February 7, 1950, gave verdict for petitioner in the sum of Eight Thousand ($8,000.00) Dollars (133, 134).

On February 14, 1950, a motion for judgment *non obstante veredicto,* urged by respondents, was denied (133, 134). Thereupon, an appeal to the Supreme Court of the State of Michigan was taken by the respondent (135).

On appeal by respondent, the Supreme Court of the State of Michigan, on March 1, 1951, set aside the judgment, without a new trial (157). Its opinion is contained in the record and has also been reported in 329 Mich. 586 (152, 158). A timely application for rehearing was made by petitioner, said application being denied by the Supreme Court of the State of Michigan, on June 4, 1951 (181). Time for filing petition for writ of certiorari was extended by this Honorable Court to October 2, 1951 (182).

This Court Has Jurisdiction

Provisions of the Merchant Seamen's Act of June 5, 1920, Chapter 250, 46 U. S. C. A. § 688, also known as the Jones Act, give State and Federal courts concurrent jurisdiction. Decisions of State courts, however, in passing upon Federal statutes, such as the Jones Act, are subject to review in this Honorable Court.

Decision of the Supreme Court of the State of Michigan, in the instant case, was based solely on an interpretation of a Federal question, and its decision relied solely on a repudiated Federal rule of evidence (*Chicago M. & St. P. Ry. Company* v. *Coogan,* 271 U. S. 472). This rule of evidence, it is urged by petitioner, has been expressly overruled by this Honorable Court. Thus, it is contended by petitioner that the Supreme Court of the State of Michigan has "decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this Court." United States Supreme Court Rules, Rule 38, Subdivision 5(a).

Further, the jurisdiction of this Honorable Court to review the decision of the Supreme Court of the State of Michigan is based upon 28 U. S. C. A. § 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, commission held or authority exercised under, the United States."

The existence of a Federal question was again brought to the attention of the Supreme Court of the State of Michigan, on petitioner's application for rehearing, wherein the request for rehearing was predicated upon the following reason:

> "In this case, which seeks to enforce a Federal statute, the decision of this Honorable Court has erroneously adopted an earlier Federal rule of evidence which has been expressly repudiated by the United States Supreme Court, in its more recent opinions."

Cases were cited in support of this contention. The Supreme Court of the State of Michigan, on June 4, 1951, without further opinion, denied the application for rehearing (181).

Argument

The right to trial by jury, set forth in the Jones Act, was denied by the Supreme Court of the State of Michigan, when it acted as court and jury, and set aside the judgment of the lower trial court, without granting a new trial, basing its decision on what it found to be a lack of proof in the light of an earlier decision of this Honorable Court whose precedent had been expressly challenged (*Chicago M & St. P. Ry. Company* v. *Coogan, supra*).

It has been held by this Honorable Court that it will review a state court's findings, "Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske* v. *Kansas*, 274 U. S. 380, 385-6. See, also, *Creswell* v. *Grand Lodge*, 225 U. S. 246, 261; *Sterling* v. *Constantine*, 287 U. S. 378, 398; *Norris* v. *Alabama*, 294 U. S. 587, 590; *Chambers* v. *Florida*, 309 U. S. 227, 228-9; *Craig* v. *Harney*, 331 U. S. 367, 373-4.

Your petitioner's brief in support of petition for rehearing before the Supreme Court of the State of Michigan is cited in support of this application for writ of certiorari, and is incorporated herein by reference.

Reference is also made to *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, wherein this Honorable Court considered injuries to a seaman aboard a ship owned by the United States. At pages 715 and 716, this Honorable Court stated, in acting on writ of certiorari previously granted:

> "The Jones Act was the culmination of a long struggle by seamen to secure more adequate relief in case of injury or death, incurred in the course of employment, than had been afforded by pre-existing law. We do not stop to review that history. But the history of the Jones Act since its enactment has been distinctive in that, at all subsequent times, seamen have opposed substituting for its provisions other forms of relief which have been tendered as being more in accord with modern trends of legislation for these matters. Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault. By 1942, when the Government took over the merchant marine, that remedy had become a thoroughly established incident of the seaman's contract of employment as much so as the historic relief afforded by the general maritime law for maintenance and cure or maritime tort. It was one which attached to every seaman's contract."

In *Carter* v. *Atlanta & St. Andrews Bay Railway Co.* (1949), 338 U. S. 430, Mr. Justice Clark, speaking for this Honorable Court, referred favorably to *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, heretofore referred to in petitioner's brief in support of petition for rehearing before the Supreme Court of the State of Michigan:

> "We granted certiorari because of the confusion which has developed in the application of the two stat-

utes (336 U. S. 935). Our duty to review certain cases of this nature is settled. *Wilkerson v. McCarthy,* 336 U. S. 53 (1949); *Keeton v. Thompson,* 326 U. S. 689 (1945); *Ellis v. Union Pacific R. Co.,* 329 U. S. 649 (1947)."

Other recent decisions in the various United States Court of Appeals, confirm the widespread application of the law promulgated in *Wilkerson* v. *McCarthy, supra,* that the right to trial by jury in this type of case should not be taken away, wherever the jury may reasonably infer from the evidence that negligence of the defendant contributed to or caused the injuries complained about.

Stanczak v. *Pennsylvania Railroad Co.,* 174 F. 2d 43 (United States Court of Appeals, 7th Circuit, dec. March 21, 1949);

Graham v. *Atchison, T. & S. F. Ry. Co.,* 176 F. 2d 823 (United States Court of Appeals, 9th Circuit, dec. August 30, 1949);

Schnee v. *Southern Pacific Co.,* 186 F. 2d 746 (United States Court of Appeals, 9th Circuit, dec. January 31, 1951).

* * * * * * *

In the instant case, the jury verdict was clearly founded upon special findings of the jury as to negligence, and not upon sympathy, or an idle consideration of the case as a whole. Special questions were submitted to the jury by the defense, which are, as follows, at pages 132 and 133, of the record:

"Question 1: Was the death of plaintiff's decedent due to the unsafe condition of the gangplank leading from the *James Watt* to the drydock?

Answer: Yes.

Question 2: Did plaintiff's decedent slip and fall from the gangplank due to the slippery condition of said gangplank on account of ice and snow?

Answer: Yes.

Question 3: Was the decedent guilty of any negligence contributing to his fall?

Answer: No.

Question 4: If your answer to Question No. 3 above is in the affirmative, have you determined what percentage of the decedent's negligence contributed to the accident?

Answer: None,

Question 5: If you have found the decedent was guilty of negligence, have you deducted his percentage of negligence from the total damages?

Not answered."

It is apparent, therefore, that the jury was fully cognizant of the evidence presented, and that its general verdict was not the result of speculation and conjecture.

The Question Presented

The right to trial by jury, as provided in the Jones Act, cannot arbitrarily be taken away by a state court, by erroneously assuming to evaluate the evidence of the case after a jury in the trial court had concluded this factual deliberation by its special and general verdicts.

Reasons Relied Upon for Allowance of Writ

1. The Supreme Court of the State of Michigan erroneously adopted an earlier Federal rule of evidence which had been expressly repudiated by the United States Supreme Court.

2. Since the Jones Act provides a right to jury trial, the Supreme Court of the State of Michigan erroneously weighed the legal effect and sufficiency of the evidence which was submitted by the trial court to the jury, so as to deprive petitioner of his right to a jury trial.

3. The Supreme Court of the State of Michigan applied erroneous reasoning as to the type of proof necessary to sustain a jury verdict under the Jones Act.

4. The Supreme Court of the State of Michigan invoked untenable state grounds as to applicable procedure and the weighing of evidence to deprive petitioner of his Federal right.

5. The decision of the Supreme Court of the State of Michigan amounts to a rejection of the right to jury trial under the Jones Act.

Respectfully submitted,

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